Supreme Court, U.S.
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No. 99-153

In the Supreme Court of the United States

OREGON NATURAL DESERT ASSOCIATION, ET AL.,
PETITIONERS

v.

MICHAEL P. DOMBECK, CHIEF, UNITED STATES
FOREST SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the issuance of permits for the grazing of cattle in National Forests requires prior state certification under Section 401(a)(1) of the Clean Water Act, 33 U.S.C. 1341(a).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 172 F.3d 1092. The opinion of the district court (Pet. App. 20-35) is reported at 940 F.Supp. 1534.

JURISDICTION

The judgment of the court of appeals (Pet. App. 17-19) was entered on July 22, 1998. A petition for rehearing was denied on April 22, 1999 (Pet. App. 36-38). The petition for a writ of certiorari was filed on July 21, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a permit issued by the Forest Service, an agency of the Department of Agriculture, for the grazing of 50 head of cattle on a grazing allotment in the Malheur National Forest in eastern Oregon. Petitioners alleged that the issuance of the permit violated Section 401(a)(1) of the Clean Water Act (CWA), 33 U.S.C. 1341(a)(1). That Section provides that no federal agency may issue a permit or license for any activity involving "any discharge into the navigable waters," unless the agency obtains certification from the State in which the discharge originates that the discharge will comply with specified Sections of the CWA. See 33 U.S.C. 1341(a)(1). The Forest Service did not require Section 401(a)(1) certification for the permit in question here—and has never required such certification for grazing permits in general—on the ground that grazing activities do not involve "discharges" within the meaning of Section 401(a)(1). The district court held that Section 401(a)(1) applies to all activities that may contribute to water pollution and enjoined the Forest Service from issuing grazing permits without Section 401(a)(1) certifications. The court of appeals reversed.

1. a. The CWA recognizes and addresses two distinct types of water pollution. First, the Act addresses the "discharge of pollutants," defined as the release of pollutants from a "point source." See 33 U.S.C. 1362(12). The term "point source" means "any discernible, confined, and discrete conveyance," such as a "pipe, ditch, [or] * * * conduit." 33 U.S.C. 1362(14). The Act establishes a "national goal" to eliminate the "discharge of pollutants" into navigable waters. See 33 U.S.C. 1251(a)(1).

The principal mechanism for controlling point-source pollution is the "National Pollutant Discharge Elimination System" or "NPDES," which establishes a national permit program for all pollutant discharges into navigable waters. See 33 U.S.C. 1342; see also *Arkansas* v. *Oklahoma*, 503 U.S. 91, 101-103 (1992); *EPA* v. *State Water Resources Control Bd.*, 426 U.S. 200, 204-209 (1976) (describing NPDES requirements). Under the NPDES program, "[e]very point source discharge is prohibited unless covered by a permit." *Milwaukee* v. *Illinois*, 451 U.S. 304, 318 (1980) (emphasis omitted). The States have primary responsibility for implementing the NPDES program. See 33 U.S.C. 1251(b). Any State may seek authorization to administer the NPDES permit program for point sources within the State. See 33 U.S.C. 1342(b). EPA has granted most States (including Oregon) such authority. See 58 Fed. Reg. 12,035, 12,036 (1993). However, authorized programs are subject to federal standards, oversight, and enforcement. See generally 33 U.S.C. 1342(b), (c) and (k) (federal approval of state programs), 1319 (federal enforcement).

Second, the CWA addresses pollution from sources other than point sources. The Act announces a "national policy" to develop programs for the control of "nonpoint sources" of water pollution. See 33 U.S.C. 1251(a)(7). Although not defined in the Act, the term "nonpoint source" refers to a source of water pollution —such as runoff from agricultural activities—that is not a "point source," *i.e.*, that is not "any discernible, confined and discrete conveyance," 33 U.S.C. 1362(14), and is therefore not subject to "point source" controls. See *National Wildlife Fed'n* v. *Consumers Power Co.*, 862 F.2d 580, 582 (6th Cir. 1988); *Oregon Natural Resources Council* v. *United States Forest Serv.*, 834

F.2d 842, 849 (9th Cir. 1987); *National Wildlife Fed'n* v. *Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982); see also 7 C.F.R. 634.5(e) (defining "agricultural nonpoint source pollution"); 40 C.F.R. 35.1605-4 (defining "nonpoint source" pollution in relation to grant program for restoration of freshwater lakes). Section 319 of the Act, 33 U.S.C. 1329, directs States to develop programs to control nonpoint source pollution, but leaves the enforcement under such programs to the States. See also 33 U.S.C. 1288(b)(2)(F) ("agriculturally and silviculturally related nonpoint sources of pollution" are included in programs for areawide waste-treatment management plans).

b. Consistent with the goal of integrating federal and state programs for controlling water pollution, Section 401(a)(1) of the Clean Water Act requires federal agencies to ensure that "any discharges" from federally licensed or permitted activities will comply with state-administered discharge controls. In particular, Section 401(a)(1) provides in pertinent part:

> Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate * * * that any such discharge will comply with [specified CWA provisions].

33 U.S.C. 1341(a)(1). The provisions cited in Section 401(a)(1) relate to various Clean Water Act programs for controlling point source pollution.

Section 401(a) was enacted in 1972, as part of the amendments that created the NPDES program. See

Pub. L. No. 92-500, § 2, 86 Stat. 877. Section 401(a)(1) was modeled on an earlier provision—Section 21(b)—which was enacted as part of the Water Quality Improvement Act of 1970. See Pub. L. No. 91-224, § 103, 84 Stat. 108. Before the 1972 amendments, the Act addressed water pollution primarily through water-quality standards—*i.e.*, standards designating the acceptable levels of pollutants for specific bodies of water. *EPA* v. *State Water Resources Control Bd.*, 426 U.S. at 202. Section 21(b) was oriented toward those standards. It provided in pertinent part:

> Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters of the United States, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate * * * that there is reasonable assurance, as determined by the State * * * that such activity will be conducted in a manner which will not violate applicable water quality standards.

See 84 Stat. 108. The 1972 amendments amounted to a "'total restructuring' and 'complete rewriting'" of the Act. *Milwaukee* v. *Illinois*, 451 U.S. at 305 (quoting legislative history). Because programs based on water quality standards proved inadequate for addressing the conduct of individual polluters, Congress changed the statutory focus from the enforcement of water quality standards to the control of discrete pollutant discharges. See *EPA* v. *State Water Resources Control Bd.*, 426 U.S. at 202-203. As part of the restructuring, Congress revised (and enacted as Section 401(a) of the CWA) the prior Section 21(b), so as to direct the focus

of the certification requirement to the Act's new discharge programs. See S. Rep. No. 414, 92d Cong., 1st Sess. 69 (1971).

c. Section 401(a)(1) refers to "discharges" from permitted or licensed activities; it does not refer to pollutant "runoff" or pollution from "nonpoint sources." That does not mean, however, that federal agencies may ignore state programs to control nonpoint source pollution. Section 313 of the Clean Water Act, 33 U.S.C. 1323, generally provides that federal agencies must comply with requirements under such state programs. Section 313(a) provides in pertinent part that:

> Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or *runoff* of pollutants * * * shall be subject to, and comply with, all Federal, State, interstate, and local requirements * * * respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity * * *.

33 U.S.C. 1323(a) (emphasis added).

2. The permit challenged in this case was a ten-year grazing permit issued by the Forest Service in 1993 to Robert and Diana Burrill, allowing them to graze 50 head of cattle on the Camp Creek Allotment in the Malheur National Forest in eastern Oregon. Such grazing could contribute to water pollution in streams flowing through the allotment. Cattle may enter the streams and deposit animal waste. Cattle may also increase sedimentation and stream temperature by

foraging on stream banks and removing shade vegetation. Pet. App. 4.

The Burrills' grazing permit is subject to conditions designed to minimize such nonpoint source pollution. Pursuant to Section 319 of the Clean Water Act, 33 U.S.C. 1329, the Oregon Department of Environmental Quality (ODEQ) developed best management practices (BMPs), including limits on levels of grazing, to mitigate the adverse impacts of cattle grazing on water quality. Under a memorandum of agreement with the ODEQ, the Forest Service included corresponding BMPs in the land and resource management plan for the Malheur National Forest and the Camp Creek Allotment. Gov't C.A. E.R. 55-61. The Burrills' permit is subject to those restrictions. *Id.* at 41.

3. Petitioners commenced this citizen suit under the Clean Water Act, 33 U.S.C. 1365, in the United States District Court for the District of Oregon, seeking a declaratory judgment that the Forest Service could not lawfully issue the Burrils' grazing permit without first obtaining a certification from the State of Oregon under Section 401(a)(1) that the grazing contemplated under the permit would not violate Oregon's water quality standards. The district court granted summary judgent to petitioners, concluding that the Forest Service must obtain a Section 401(a)(1) certification before issuing a permit for activities that could cause nonpoint source pollution. Pet. App. 20-35. The district court based that conclusion on two grounds.

First, the district court noted that Section 401(a)(1) requires a certification for any activity that "may result in any discharge," 33 U.S.C. 1341(a)(1). The terms "discharge of a pollutant" and "discharge of pollutants" are defined in the CWA to refer to point sources. See 33 U.S.C. 1362(12). The CWA further provides that the

term "discharge" "when used without qualification includes a discharge of a pollutant, and a discharge of pollutants." 33 U.S.C. 1362(16). The court reasoned that "[t]he term 'including' in the discharge definition permits additional, unstated meanings," and that "the plain meaning of 'discharge' does not restrict the definition to point sources or nonpoint sources with conveyances." Pet. App. 31.

Second, the district court stated, based on its review of the legislative history for Section 21(b) of the Water Quality Improvement Act of 1970 (84 Stat. 108)—the predecessor of Section 401(a)(1)—that Congress intended that provision to regulate "all polluting activities." Pet. App. 33. Noting that the 1972 amendments that enacted the current Section 401 were intended to broaden, not narrow, the scope of the Act, the district court concluded that Section 401(a)(1) likewise applies to "all federally permitted activities that may result in a discharge, including discharges from nonpoint sources," or, in other words, to "all federally permitted activities that might result in water pollution." *Id.* at 34.

4. The court of appeals reversed. With respect to the meaning of "discharge," the court of appeals found that the term is used consistently throughout the Clean Water Act to refer to the "release of effluent from a point source." Pet. App. 13-14. The court held that the term "discharge" is defined more broadly than the term "discharge of a pollutant" not because "discharge" is intended to apply to nonpoint source pollution, but because "discharge" is intended to include "all releases from point sources," including releases (such as releases through dams) that do not involve the "addition of a pollutant." *Id.* at 15. With respect to legislative history, the court of appeals observed that Section 21(b) of the Water Quality Improvement Act of 1970 was

replaced by Section 401(a)(1) of the Clean Water Act in 1972 "to assure consistency with the [Act's] changed emphasis from water quality standards to effluent limitations based on the elimination of any discharge of pollutants." See *id.* at 12 (citing S. Rep. No. 414, *supra*, at 69). As noted by the court, Section 401(a)(1) now requires States to certify that "any discharge" from a federally-licensed project will comply with various Sections of the Clean Water Act that "relate to the regulation of point sources." Pet. App. 12. In short, the court of appeals found that certification under Section 401(a)(1) of the CWA is required only for federally permitted activities that may result in "discharges from point sources." *Ibid.*

ARGUMENT

The court of appeals correctly held that Section 401(a)(1) of the Clean Water Act does not apply to grazing and other federally-licensed activities that do not involve point source pollution. The court's holding is consistent with a plain reading of the Act and with more than 25 years of consistent agency practice. It does not conflict with any decision of this Court or with any decision of another court of appeals. Further review is therefore not warranted.

1. Section 401(a)(1) expressly applies only to activities that involve or may involve a "discharge." The term "discharge," as used in Section 401(a)(1), does not apply to all sources of water pollution. In drafting the Act, Congress was careful to distinguish between the "discharge" of pollutants from conveyances and the "runoff" from nonpoint sources of pollution. See *National Wildlife Fed'n* v. *Consumers Power Co.*, 862 F.2d at 582. The court of appeals correctly held that Section 401(a) certification is required for activities that

may result in "discharges" (*i.e.*, releases from point sources), but that such certification is not required for activities that involve "runoff" (*i.e.*, flows from nonpoint sources).

a. The fact that Congress defined the term "discharge" separately from the phrase "discharge of a pollutant" does not mean that Congress intended the former term to be divorced from the concept of a "point source." Indeed, the obvious distinction between a "discharge" and a "discharge of a pollutant" is not the presence or absence of a point source, but the presence or absence of a pollutant. The existence of a point source determines whether there is a "discharge" at all. The term "discharge of a pollutant" then more specifically refers to the "addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12). As the court of appeals recognized (Pet. App. 15), the term "discharge" standing alone "includes" the addition of pollutants from point sources, 33 U.S.C. 1362(16), and it also includes other "point source" releases that do not involve the "addition of pollutants."

For example, water flows released through a dam pass through a "point source" or "discrete conveyance" and thus are "discharges" within the meaning of the Clean Water Act. See *National Wildlife Fed'n* v. *Gorsuch*, 693 F.2d at 165. Because such discharges typically do not involve the "addition" of pollutants, the discharges usually are not subject to NPDES permitting requirements. *Id.* at 174-175 (deferring to EPA interpretation). However, such "discharges" are subject to Section 401 certification. See, *e.g.*, *PUD No. 1* v. *Washington Dep't of Ecology*, 511 U.S. 700, 711 (1994).

Had Congress intended Section 401(a) to apply to nonpoint source pollution in addition to pollution caused by "discharges," Congress could have said so. When

drafting the Act's requirement that federal facilities comply with the substantive requirements of state law —in a provision enacted at the same time as Section 401(a)—Congress made that requirement applicable to any federal activity "resulting, or which may result, in the *discharge or runoff* of pollutants." See 86 Stat. 875, 33 U.S.C. 1323(a) (emphasis added). Congress could have used similar language in Section 401(a) in identifying which federal activities also require a prior state certification. In the alternative, Congress could have expressly defined the term "discharge" to include pollutant "runoff" or "nonpoint source" pollution. Instead, Congress expressly limited Section 401(a) to "discharges," and defined the term "discharge" (in relation to the phrase "discharge of pollutants") to mean a "point source" release.[1]

b. Petitioners' reliance (Pet. 12-17) on legislative history related to Section 21(b) of the Water Quality Improvement Act of 1970 is misplaced. Section 21(b), like Section 401(a), expressly referred to federally licensed activities that may result in "any discharge." When Section 21(b) was enacted, the term "discharge" was not defined. Petitioners cite a report by a Committee of the House of Representatives stating that Section 21(b) was intended to apply to any licensed activity "that could in fact become a source of pollution." See Pet. 14 (citing H.R. Rep. No. 127, 91st Cong., 1st Sess. 7, 20 (1969)). That report language could

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[1] Standard dictionary definitions support the conclusion that the term "discharge" refers to a release of water through a conveyance. See *Webster's Third New Int'l Dictionary* 644 (1986) (defining "discharge" as, *inter alia*, "to send forth" and "to give outlet to: pour forth: emit"; see also *PUD No. 1*, 511 U.S. at 725 (Thomas, J., dissenting) (quoting dictionary definitions of discharge as "a flowing or issuing out" and "something that is emitted").

perhaps be read to suggest that the term "discharge" in Section 21(b) was not intended to be a term of limitation, despite the narrower focus of that term in ordinary usage (see note 1, *supra*). None of the legislative reports cited by petitioners, however, expressly addressed "runoff" or "nonpoint" pollution. Further, petitioners cite no case law or other authority actually applying Section 21(b) to activities—such as grazing on federal lands—that implicate only nonpoint source pollution.

In any event, whatever may have been the meaning of Section 21(b), Congress completely rewrote the Clean Water Act two years after Section 21(b) was enacted. *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 489 (1986); *Milwaukee* v. *Illinois*, 451 U.S. at 317-318. In the course of the statutory overhaul, Section 21(b) was repealed and replaced with Section 401(a). At the same time, Congress added definitions for the terms "discharge," "discharge of a pollutant," and "point source." Given the complete rewriting of the statute, including the addition of applicable definitions, the legislative reports relating to the superseded statutory provision no longer provide authority for the meaning of the term "discharge" in the new Section 401(a).

According to legislative reports accompanying the 1972 amendments, Section 401 was revised (as compared with Section 21(b)) "to assure consistency" with the new legislative emphasis on "the elimination of any discharge of pollutants." See S. Rep. No. 414, *supra*, at 69. Congress achieved that goal in part by tying the certification requirement to the new requirements applicable to the types of discharges that may result in discharges of pollutants, *i.e.*, releases from point sources. There is no basis for the assumption that

Congress intended in addition to sweep into the certification program a wide variety of federal permits for activities that may result in runoffs (*i.e.*, flows from nonpoint sources). Accordingly, whatever may have been the scope of the supplanted Section 21(b), the court of appeals correctly held that the term "discharge," as used in Section 401(a), means the same as the term "discharge" as used and defined in the phrase "discharge of pollutants"—*i.e.*, a "point source" release.

c. Petitioners argue (Pet. 18-20) that Section 401(a)'s reference to state water quality standards indicates that Section 401(a) applies to permits for activities that may result in runoffs or nonpoint source pollution. The fact that Section 401(a) refers to state water quality standards, however, is irrelevant to the issue of whether Section 401(a) applies to nonpoint sources.

Section 21(b) called upon States to determine whether federally-licensed activities would "violate applicable water quality standards." By referring to Section 303 of the Clean Water Act—which directs States to develop water quality standards—Section 401(a) retains a reference to such standards. In particular, Section 401(a) calls upon States to determine whether "discharges" from licensed activities would "comply with" Section 303. 33 U.S.C. 1313. Contrary to petitioners' argument (Pet. 20), however, that reference does not "confirm" a supposed congressional intent to extend the applicability of Section 401(a) to nonpoint pollution sources. Water quality standards provide a basis (in addition to technological standards) for establishing effluent limitations on particular point sources. See *EPA* v. *State Water Control Bd.*, 426 U.S. at 205 n.12; *Oregon Natural Resources Council* v. *United States Forest Serv.*, 834 F.2d at 849-850. Although water quality standards could also provide a basis for

establishing controls on activities that cause nonpoint source pollution, the mere reference to water quality standards does not convert a program for the control of "discharges" into a program for the control of all water pollution, including that caused by runoffs. *Id.* at 850.

Petitioners also err in arguing (Pet. 21) that States are without "authority to address nonpoint pollution generated by federally permitted activities" if the prospect of nonpoint source pollution does not trigger review under Section 401(a). State authority to regulate nonpoint source pollution is recognized under Sections 101(b) and 319 of the Clean Water Act, 33 U.S.C. 1251(b), 1329. Section 313(a) of the Clean Water Act expressly provides that "runoff of pollutants" from any federal property, facility, or activity is subject to all state water pollution laws. See 33 U.S.C. 1323(a). The court of appeals did not free federal agencies or federal permittees from that duty to comply with nonpoint source pollution requirements imposed by the States. The court of appeals simply held that federally-licensed activities that do not involve discrete discharges are not subject to Section 401's requirement of a prior certification by the State.

2. Petitioners err in contending (Pet. 22) that the decision of the court of appeals is contrary to this Court's decision in *PUD No. 1* v. *Washington Department of Ecology, supra.* *PUD No. 1* involved the State of Washington's review of plans for a federally-licensed hydroelectric project. The project was designed to divert water from a river and run the water through turbines to generate electricity, then return the water to the river more than a mile downstream. 511 U.S. at 708-709.

Because the water would be returned through a "tailrace," it was undisputed in *PUD No. 1* that the pro-

ject involved a "discharge" and was subject to Section 401 certification. 511 U.S. at 711. The only dispute was whether the State could impose limitations on the project's water intake as a condition of certification under Section 401(d), 33 U.S.C. 1341(d). 511 U.S. at 710. Such limitations were aimed at maintaining minimum stream flows in the "bypass reach"—*i.e.*, the stretch of the river between the project's intake point and the project's discharge point. *Ibid.* This Court held that the "threshold condition" for Section 401 certification was a "discharge," but once that condition was met, the State could impose "conditions and limitations on the activity as a whole." *Id.* at 712.

Contrary to petitioners' assertion (Pet. 23), *PUD No. 1* did not address nonpoint source pollution. The focus of *PUD No. 1* was on conditions related to the *removal* of water from a river, not conditions related to the addition of pollutants from nonpoint sources. The Court clearly acknowledged that the "threshold condition" for Section 401 certification is "the existence of a discharge." 511 U.S. at 711. In the present case, the court of appeals reached the very same conclusion, holding that Section 401 certification is not required for grazing permits because cattle grazing does not involve "discharges" within the meaning of Section 401.

3. Finally, petitioners' contention that Section 401(a) certification is required before the federal government may issue a permit for any activity that may result in a runoff (*i.e.*, a flow from a nonpoint source) is contrary to consistent administrative practice for more than a quarter of a century since the CWA was enacted. Under petitioners' theory, virtually every federal permit for grazing, camping, harvesting timber, or undertaking any other activity on federal land that is anywhere near navigable water would require a Section

401(a) certification, since every such activity could result in a runoff into the water. Yet no federal agency has ever required Section 401(a) certification before issuing a permit for an activity merely because that activity could result in a runoff, and, prior to this case, no State had attempted to enforce the certification authority that petitioners contend exists.[2] The court of appeals' decision adopting this consistent administrative understanding of Section 401(a) is correct and does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[2] After the district court's decision in this case, the Oregon Department of Environmental Quality promulgated regulations regarding Section 401(a)(1) certification for Forest Service grazing permits. Or. Admin. R. 340-048-0100 *et seq.* (1998). The State has informed the Forest Service that, after the court of appeals' decision in this case, it ceased accepting any applications for Section 401(a)(1) certification of federal grazing permits.